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SOME THOUGHTS ON STATUTORY INTERPRETATION WITH SPECIAL EMPHASIS ON JURISDICTION

Bernard S. Meyer*

My subject is epitomized by Mr. Justice Holmes' characteristically terse statement that "[a] word . . . is the skin of a living thought,"1 and in then Professor Felix Frankfurter's definition of words as "symbols of meaning [which in the] phrasing of . . . a complicated enactment, seldom attains more than approximate precision."2

The vagaries of language are but a part of the problem presented by statutory interpretation. Equally troublesome are the ambiguities of the legislative process and the sometimes result-oriented nature of judicial interpretation.3 Unlike his civil law counter-
part, who in the earlier development of the civil law (and indeed to some extent even today) was expected to refer problems of statutory interpretation in a given case to the legislature for solution, a common law judge is faced at various times with arguments that he construe an unclear statutory provision, or that he interpolate interstitially what can be found to be within the purpose though not the wording of a statute. Moreover, he may be faced with applying a statute the terms of which have remained constant to circumstances which have changed sufficiently since a prior interpretation to require a different interpretation in the case presently before him.

My thesis is that much of the present hodge-podge of statutory interpretation can be alleviated by establishing legislative templates or guidelines for determining when a particular concept, such as what is jurisdictional, is to be applied, and by legislative definition of the materials that are to be used in the process of interpretation.

I. STATUTORY INTERPRETATION AND LEGISLATIVE HISTORY - THE PRESENT RULES

As the law presently stands, the most important thing that can be said about legislative history is that in no case of any importance can it be safely overlooked, whether to find material supportive of an attorney's point of view or to be in a position to forestall use by the court of material which an adversary will urge upon the court as supportive of his position. The important role of legislative history is evidenced rather dramatically by a 1982 article surveying the use of legislative history by the Supreme Court during the forty years from 1938 to 1979. In the entire 1938 term there were but nineteen cita-


The extremes to which interpretational techniques are sometimes sought to be carried is suggested by a decision of the Michigan Worker's Compensation Appeal Board rejecting the argument that a male employee who died on a business trip after sexual relations with a female coemployee had had an accident in the course of employment within the meaning of the compensation law. N. Y. Times, May 3, 1985, at A15, col. 2. See also N.Y. Times, July 20, 1986, at 25, col. 1 (reporting the rejection by the Lakeside Park City Council of its zoning administrator's proposal to exempt from the ordinance's prohibition of "detached structures" a child's tree house).

4. J. MERRYMAN, THE CIVIL LAW TRADITION 39-47 (2d ed. 1985). For a related view that would refer to the Congress after the Supreme Court had denied certiorari the meaning of an ambiguous statutory provision, see Stevens, Some Thoughts on Judicial Restraint, 66 JUDICIAL CATEGURIE 177, 183 (1982). Under his proposal the choice made by Congress would not govern the particular case out of which the issue arose. It is, therefore, more closely akin to the functioning of a Law Revision Commission than to the civil law practice.

5. Carro & Brann, The U.S. Supreme Court and the Use of Legislative Histories: A
tions to items of legislative history. By the end of the 1970's that had increased to between 300 and 400 per term, and in the 1981-1982 term legislative history was discussed in almost half of the 141 opinions written by the Court. So pervasive has the use of legislative history become that what Felix Frankfurter referred to in 1947 as "the quip that only when legislative history is doubtful do you go to the statute" found its way into a 1971 Supreme Court opinion which in all seriousness stated that "because of this ambiguity [in the legislative history] we must look primarily to the statutes themselves to find the legislative intent." More than twenty-five years ago, Professor Llewellyn pointed out that with respect to statutory construction "there are two opposing canons on almost every point." In support of that statement Llewellyn juxtaposed some twenty-eight illustrations, with supporting case law and textual authorities. Little wonder, then, that the late Judge Harold Leventhal characterized legislative history as a process of "looking over a crowd and picking out your friends."

In considering various interpretative techniques the rule of construction most frequently espoused is that "if the language of a statute is plain and unambiguous, there is neither need nor warrant to look elsewhere for its meaning." But true to Llewellyn's thesis, the same court that enunciated the rule just quoted, the New York Court of Appeals, has also said that "this rule of construction suffers from the basic fallacy that words have meaning in and of themselves." In *New York State Bankers Association v. Albright*, the court further commented that the "absence of facial ambiguity is


6. Frankfurter, supra note 2, at 543.


9. Id. at 523-28.


11. Roosevelt Raceway v. Monaghan, 9 N.Y.2d 293, 304, 246 N.E.2d 333, 337, 298 N.Y.S.2d 473, 478 (1960). *Accord* Bourjaily v. United States, 107 S. Ct. 2775, 2780 (1987) ("It would be extraordinary to require legislative history to confirm the plain meaning . . . ." (emphasis in original)). It is, however, worthy of note that in Roosevelt Raceway the majority opinion and one of the three dissenting opinions relied upon the same absence of ambiguity to reach diametrically opposed results!


rarely, if ever, conclusive. The words men use are never absolutely certain in meaning. The limitations of finite man and the even greater limitations of his language see to that. Inquiry into the meaning of statutes is never foreclosed at the threshold.\textsuperscript{14} These apparently contradictory statements may be attributable to legislative history itself, which will often either reinforce what to the decision writer is the plain meaning of the statutory language or be so inconclusive as not to rebut that reading.

English courts, while rejecting most other legislative history, do cite the reports of study commissions upon which particular legislation is based, but only to affirm legislative purpose.\textsuperscript{15} Some American cases also suggest that legislative history should be used only when confirmatory. In \textit{Carr v. New York State Board of Elections},\textsuperscript{16} the New York Court of Appeals, construing a provision of the Election Law stating that failure to file a certificate of nomination “shall be a fatal defect,”\textsuperscript{17} cited the memorandum of the Department of State, at whose instance the statute was amended to include those words, to establish that the purpose of the amendment was to make “the time limitation . . . absolute and not a matter subject to the exercise of discretion by the courts.”\textsuperscript{18} Likewise, in \textit{Maine v. Thiboutot},\textsuperscript{19} the Supreme Court, in justifying its reading of statutory language, reasoned that “the legislative history does not demonstrate that the plain language was not intended.”\textsuperscript{20} Furthermore, while the \textit{Albright} opinion, which suggests the need for inquiry into a statute’s meaning, is that of a seven person court, it should also be noted that the view of its author, former Chief Judge Charles D. Breitel, is that rejection is required “when the extrinsic material tends to contradict or vary the meaning determined literally or in context.”\textsuperscript{21}

The difficulty is that so long as inquiry into the legislative history is not foreclosed, even for confirmatory purposes, delving into the legislative history grabbag will often produce materials which

\textsuperscript{14} Id. at 436, 343 N.E 2d at 738, 381 N.Y.S.2d at 20.
\textsuperscript{15} Dickerson, Statutory Interpretation: Dipping Into Legislative History, 11 \textit{HOFSTRA L. REV.} 1125, 1131 (1983).
\textsuperscript{17} Act effective May 10, 1969, ch. 529, 1969 \textit{N.Y. LAWS} 1650 (codified as amended at \textit{N.Y. ELEC.} § 6-158 (McKinney 1987)).
\textsuperscript{18} 40 N.Y.2d at 558, 356 N.E.2d at 715, 388 N.Y.S.2d at 88.
\textsuperscript{19} 448 U.S. 1 (1980).
\textsuperscript{20} \textit{Id.} at 8.
\textsuperscript{21} Dickerson, \textit{supra} note 15, at 1135 (statement by Breitel to Professor Dickerson).
convert to a truism A.P. Herbert's jest that "[i]f Parliament does not mean what it says, it must say so." Moreover, when such materials exist they create a substantial risk that plain meaning will no longer be regarded as plain.

A. The Legislative Process

The problem, of course, is that the legislative process has so many components and so many actors participating in each component that it is almost impossible to discern an intent in any true sense of the word.

While a legislative bill must have a sponsor, bills are often sponsored by more than a single legislator. Once sponsored, the legislation is considered by a committee composed of a number of members assisted by a staff. The committee holds hearings during which interested parties testify and from which it produces a report. The committee members, however, will probably also have been importuned by lobbyists for particular interests.

Following committee action, the bill is considered by the entire legislature. In most cases, debate on the bill, which is held separately in each house, is a matter of multi-party question and answer. From such material intent is not readily discernable; the only indication of consensus in each particular house as to any given answer must be divined from the ultimate approval of the bill. Moreover, consensus may be the product of votes cast for widely differing reasons.

If the consensus in one house of the legislature results in a bill different from that in the other, the bill then goes to a conference committee composed of members of both houses. The conference committee hammers out a version acceptable to the representatives of each house, but approval of the conferenced version in the separate houses may be more dependent on legislative discipline than on review of the conference report.

When finally approved by both houses, the bill goes to the President or Governor for consideration by that official and his or her staff. Here false clues as to legislative intent may creep in. Before

22. A.P. Herbert, Uncommon Law 192 (1936).
25. See id. at 1132-33.
26. N. Singer, supra note 23, at § 11.08.
the executive approves or vetoes the bill, he or she will receive input from interested parties. While this may have bearing on the executive's intent in acting on the bill, it certainly has nothing to do with the intent of the legislators who earlier voted for the bill. Little wonder then that Llewellyn viewed "'legislative intent' as being in eight litigated cases out of ten pure will-o'-the wisp," and that Mr. Justice Harlan should have seen the process as one in which the legislature "has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding.

B. The Materials Presently Considered by the Courts

The substantial risks involved in judicial attempts to distill legislative intent from this process is clear from the types of legislative materials actually used by the courts. Thus, the New York Court of Appeals stated flatly, in People v. Whidden, that "what motivates one legislator to propose or make a speech urging passage of a statute is not necessarily what motivates scores of others to enact it," and in People v. Graham, that "there is no necessary correlation between what the draftsman of the text of a bill understands it to mean and what members of the enacting legislature understand." The less than absolute nature of those statements is, however, suggested by the words "necessarily" and "necessary."

Statements in debate are accorded some weight, those of the sponsor more so than the opponents. Although an opponent's statement which agrees with the sponsor's views and thus shows essential agreement on the point involved may be of importance, courts often discount an opponent's remarks because they tend to exaggerate the reach of a proposed statute in in terrorem arguments. The problem with debate material is compounded by its literal inaccessibility on a

28. See Dickerson, supra note 15, at 1133-34.
29. K. LLEWELLYN, supra note 8, at 382, 529.
32. Id. at 462, 415 N.E.2d at 929, 434 N.Y.S.2d at 939.
34. Id. at 151, 432 N.E.2d at 794, 447 N.Y.S.2d at 922. Lord Halsbury put it even more emphatically in Hilder v. Dexter, 1902 App. Cas. 474, characterizing the draftsman as "the worst person to construe [a statute, because] he is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed." Id. at 477.
36. Id. at 394 ("The fears and doubts of the opposition are no authoritative guide to the construction of legislation.").
state level. Even Congressional debates create problems both because of the virtual inaccessibility of the Congressional Record to a large portion of those governed by the legislation enacted and because of the extension and revision of floor statements permitted by Congressional rules.\textsuperscript{37} Moreover, the value of debate materials becomes problematical because it is impossible to tell from the printed record of debate whether what was said on a given point was said in furtherance of the intended purpose of the legislation or rather with the intent of creating legislative history and thereby making it possible for a construing court to read something into the statute that, if stated on the face of the bill, would block its passage.\textsuperscript{38}

The primary source for ascertaining legislative purpose is the legislative findings or declaration of intent sometimes enacted as part of the chapter law, but not in every case included in the codification. Thus, where it is not so codified, it may pay to go back and look at the session laws. Next in frequency of reference by courts to legislative materials is a memorandum of the sponsoring legislator or legislators, or of the proposing executive, legislative or judicial body. Because it will usually do no more than paraphrase the major sections of the bill, however, such a memorandum is seldom much help in interpreting the text, and indeed, if the paraphrase deviates much from the text, it may create more problems than it answers.

Of greater value will be the report of the committee to which the bill is assigned, because it is available to interested legislators and can be expected to spell out at least the motivation for the proposed legislation and the reach of the more important or controversial of its provisions.\textsuperscript{39} But not every boilerplate statement in such a report will be accorded significance. Thus, in \textit{United States v. Price}\textsuperscript{40} the Supreme Court concluded that the 1874 revision of the Civil Rights Law had, indeed, substantially changed the law, notwithstanding "the customary stout assertions of the codifiers that they had merely clarified and reorganized, without changing substance."\textsuperscript{41}

Of even greater value are the studies that often precede preparation of legislation and which generally contain a review of existing

\begin{itemize}
\item 37. Dickerson, \textit{supra} note 15, at 1132-33.
\item 39. Dickerson, \textit{supra} note 15, at 1131-32.
\item 40. 383 U.S. 787 (1965).
\item 41. \textit{Id.} at 803.
\end{itemize}
law and spell out in some detail the legislative facts which suggest the need for a change. Such studies are usually made by an official body, such as the Law Revision Commission, the Advisory Committees to the Office of Court Administration on the Civil Practice Law and Rules, and on the Criminal Procedure Law, or the Commissioners on Uniform Laws, by a Joint Legislative Committee or temporary commission created by the legislature, or by an executive department or agency such as the Attorney General, the Superintendent of Banks or the Commissioner of Investigation. They may, however, also be the work of unofficial bodies, such as the American Law Institute, and even in isolated instances of such a body as the Commonwealth Fund of New York, at whose instance the Shopbook Rule found its way into New York law. The only difficulty with such studies is that they are not generally readily accessible to those who are governed by the law. The exception is the Uniform Commercial Code and some other uniform laws, where the Uniform Commissioners' study material appears as "Official Comment" after each section and in New York is followed by New York Annotations which include reference to any relevant Law Revision Commission study.

Hearings, to the extent that they include explication of the legislation and its purpose by the sponsoring legislator or a representative of the study agency, are accorded some weight, as illustrated by the opinions of the New York Court of Appeals in American Sugar Refining Co. v. Waterfront Commission, and Bazar v. Great American Indemnity Co. But the testimony of other witnesses will seldom be considered by a court in the process of interpretation, coming as it does from partisans, usually those in favor of the bill, who are subject to little probing.

Probably the best known, but to my way of thinking least persuasive, items of legislative history comes from the Governor's office. Of course, when he sponsors legislation, the memorandum accompanying the bill will be given great weight, but, with respect to other legislation, his message of approval and other materials included in

44. See N.Y. U.C.C. (McKinney 1987).
the Governor's bill jacket are accorded more weight than, in my view, they should be. As to the message of approval, it has played no part in the wording of the statute, and as to the material in the bill jacket, it, like the statements of witnesses at hearings, comes from correspondents who have a particular axe to grind and who had no input in the drafting or adoption of the bill. Even a memorandum to the Governor from the sponsor of the bill is not regarded as a reliable indicator of legislative input because there is nothing to show "that the other legislators were aware of the broad scope apparently intended for the bill by its sponsor." As for a veto message, its only relevance is with respect to later bills on the same subject introduced in response to the veto message. This is true even though the legislature overrides the gubernatorial veto, because such action neither agrees nor disagrees with the Governor's interpretation of the statute.

Post-enactment statements, whether of a sponsor, committee or commission member, and whether offered in written form or as live testimony, are accorded no weight at all. The one post-enactment event to which significance is attributed is the failure of the legislature to amend a statute in order to change an interpretation of it by an administrative agency or court. This rule appears subject to serious question, however, for the failure to act does not necessarily indicate legislative approval. It may and often does result from other and varied causes.

48. See In re Lorie C, 49 N.Y.2d 161, 169, 400 N.E.2d 336, 340, 424 N.Y.S.2d 395, 399 (1980); see also Dickerson, supra note 15, at 1130 (stating that material extrinsic to the statute is properly considered only where "reasonably available" to, and "taken into account" by, the drafters of the statute); Mikva, supra note 38, at 185 (stating that post-enactment speeches and letters should not be used to determine enactors' intent).
II. WHAT SHOULD THE RULES BE?

By now the reader will have begun to get the flavor of Judge Leventhal’s “picking out your friends” remark,51 and to understand that the rules for determining and dealing with statutory ambiguity are themselves ambiguous, in good part based on fiction, and involve materials inaccessible to many governed by the resulting legislative product.

A. The Need for Clarification

Some hope for clarification was generated by the decision of the New York Court of Appeals in the analogous situation presented by Golden v. Koch.52 Prior to that case, it had long been the rule that in construing a charter approved by public referendum, the court was to be guided by the meaning that the words of the charter would convey to the “intelligent, careful voter.”53 In Golden, that rule was abandoned because:

when one considers the documents by which voters are apprised of constitutional or charter amendments, the places at which they are made available, and the time normally required to peruse, much less digest, the content of such materials, it is clear that so few voters do what the “intelligent, careful voter” rule assumes they do that this standard has become little more than an empty legal fiction.54

Without question, the situation confronted by a court which must interpret the public’s intent in approving a charter can be distinguished from the case in which the court must determine a legislature’s intent; the contact of the voters with the materials to be acted upon is much more fleeting than is the contact of most of the actors engaged in the legislative process with the materials on which their action is based. Possibly, because of that distinction, there has been no movement in the intervening years since Golden was decided to bring about judicial abandonment of the similar fictions involved in legislative interpretation. Yet the necessity for improvement of the system has long been recognized elsewhere. Pennsylvania and Minnesota, as long ago as 1937 and 1941, respectively, adopted as part of their statutory construction acts a section entitled Legislative In-

51. See supra note 10 and accompanying text.
53. Id. at 693, 404 N.E.2d at 1322, 427 N.Y.S.2d at 781.
54. Id. at 694, 404 N.E.2d at 1323, 427 N.Y.S.2d at 781.
tent Controls. Similarly, in 1962, the California Assembly established the Subcommittee on Legislative Intent of the Assembly Committee on Rules. The Commissioners on Uniform Laws, as part of their Uniform Statutory Construction Act, included as section 15 a list of what may be considered when a statute is ambiguous. The need for improvement has also been recognized by well-known text-writers on statutory interpretation, such as Professor Reed Dickerson and Senator-Professor Jack Davies.

These efforts, however, have not alleviated the problem presented by the uses presently made of legislative history. The California Assembly Subcommittee ultimately concluded that there should be wider use of committee reports, but that the statements of individual opinion (other than of the sponsor) should not be used. The Subcommittee further recommended that the usable history be limited to materials known to the legislature when the statute was under consideration and thus reflecting an “official” view. Finally, while considerations of expense and accessibility militated against the use of floor debates, the Subcommittee also recommended wider publication of materials prepared by the Legislative Counsel. But inquiry some twenty years later indicates that the only positive result of those recommendations has been the inclusion of analyses of bills in the reports of standing committees, which, however, “vary greatly in length and comprehensiveness.”

The Pennsylvania and Minnesota statutes and the Uniform Act,

55. MINN. STAT. ANN. § 645.16 (West 1947); 1 PA. CONS. STAT. ANN. § 1921 (Purdon 1987).
56. SUBCOMMITTEE ON LEGISLATIVE INTENT OF CALIFORNIA, REPORT TO THE ASSEMBLY RULES COMMITTEE OF 1963 (1963)[hereinafter REPORT].
60. REPORT, supra note 56, at 45.
61. Id.
62. See id. at 45-46.
63. Letter from Mark F. Terry, the Legislative Counsel of California, to Senator Ken Maddy (Nov. 4, 1983) (discussing the results, after twenty years, of the recommendations of the Final Report of the Subcommittee on Legislative Intent) (on file at HOFSTRA LAW REVIEW). See also People v. Tanner, 24 Cal. 3d 514, 596 P.2d 328, 156 Cal. Rptr. 450 (1979) (noting that Legislative Counsel's summary of an earlier enactment, which was consistent with memorandum prepared by the Senate Committee on the Judiciary, was a legitimate source of legislative intent); Comment, THE USE OF EXTRANSC AID IN DETERMINING LEGISLATIVE INTENT IN CALIFORNIA: THE NEED FOR STANDARDIZED CRITERIA, 12 PAC. L.J. 189, 202-04 (1980) (discussing the possibility that limited circulation and cursory analysis may diminish evidentiary value of committee reports).
although useful in defining the context in which the purpose of a particular statute is to be sought, are not helpful with the problem we are now considering since they simply authorize the use of "legislative history" without defining the kind of materials that may be considered. Professor Davies, while noting the need for reform through legislation of the rules on legislative history, concludes that rules have yet to be adopted because there is no interest group to press for them. His conclusion is supported by the fact that the Uniform Act has been enacted only in the States of Colorado, Iowa, and Wisconsin in the twenty-odd years since it was prepared, a fact which resulted in its designation being changed from that of a Uniform Act to that of a Model Act in 1975. In this author's view, the present mishmash of rules and results has brought the problem to crisis proportions requiring more standardized criteria so that legislatures will have a clearer picture of what they are enacting, and contrived history or chance remarks can no longer play a part in interpretation.

B. Would a Statute Establishing Guidelines for Construction be Valid?

Is there a means of developing criteria that can be effective? Professor James Thomas' view is that interpretation acts are probably unconstitutional because they interfere with the prerogatives of the judiciary and therefore, violate separation of powers principles. I disagree, as does Professor Dickerson, because, carried to its logical extreme, the Thomas suggestion would invalidate any statutory definition that was not a rote duplication of the term in question as utilized in common speech. Yet statutory definitions of more limited scope are judicially recognized.

64. See MINN. STAT. ANN. § 645.16 (West 1947); 1 PA. CONS. STAT. ANN. § 1921 (Purdon 1987); UNIF. STATUTORY CONSTRUCTION ACT § 15, 14 U.L.A. 513 (1980).
65. See J. DAVIES, supra note 59, at 317.
66. COLO. REV. STAT § 2-4-400 to 402 (1980).
68. WIS. STAT. ANN. § 990.001-07 (West 1985).
70. See Thomas, Statutory Construction When Legislation is Viewed as a Legal Institution, 3 HARV. J. ON LEGIS. 191, 211 & n. 85 (1966). It was Thomas' view also that to apply stare decisis in matters of statutory construction would constitute a separation of powers violation. Id. at 212-19.
71. See R. DICKERSON, supra note 58, at 262, 272.
72. See People v. New York Central & Hudson R.R., 156 N.Y. 570, 51 N.E. 312 (1898); In re Bronson, 150 N.Y. 1, 44 N.E. 707 (1896); O'Keeffe v. Dugan, 185 A.D. 53, 172
More troublesome from the constitutional point of view is the problem posed by Professor Dickerson: can an earlier legislature bind a later one? He concludes that it cannot, that the later legislature must expressly adopt the definition enacted as part of a general construction law by an earlier legislature, and therefore, the ultimate solution is not such boilerplate provisions, but better legislative drafting.\textsuperscript{73}

The problem posed by Professor Dickerson is, in my view, not as great a stumbling block as it would appear at first blush. When the classification device hereafter discussed is used there is express adoption of the earlier enacted definition by the later legislature. In situations which do not lend themselves to classification, the device used would be a general statutory construction provision to be applied to all future legislation except as the later legislature expressly declares otherwise. It can be argued, of course, that the failure of the later legislature to negate expressly the use of the construction provision may be the result of oversight and that its prerogatives are in fact interfered with to that extent. At worst that would result in a throwback to the present rules governing implied amendment or repeal of the construction provision, under which the later legislative enactment is usually held not to have overturned or modified the earlier.\textsuperscript{74}

But as a practical matter, in view of the existence of legislative drafting bodies and the fact that the construction provision itself would serve as a powerful reminder of the wisdom of speaking expressly to the particular point by incorporating the construction provision by reference, the number of situations in which possible unconstitutionality would present practical difficulty should not be very great.

That premise excepts states, like New York, which have a constitutional provision proscribing passage by the legislature of an act providing that an existing law shall be deemed part of the act, unless the prior law is actually inserted in the later act.\textsuperscript{76} Whether a statutory construction provision such as is hereafter proposed would run afoul of such a constitutional prohibition against incorporation by reference is unclear. The New York General Construction Law,\textsuperscript{76}

\begin{itemize}
  \item N.Y.S.2d 558 (1918), \textit{aff'd}, 225 N.Y. 667, 122 N.E. 887 (1919).
  \item \textsuperscript{73} See R. Dickerson, supra note 58, at 272, 277-78, 281.
  \item \textsuperscript{74} See, e.g., Alweis v. Evans, 69 N.Y.2d 199, 505 N.E.2d 605, 513 N.Y.S.2d 95 (1987).
  \item \textsuperscript{75} N.Y. Const. art. III, § 16.
  \item \textsuperscript{76} N.Y. Gen. Constr. Law § 110 (McKinney 1951).
\end{itemize}
which contains definitional provisions that are regularly read into later enacted statutes, also recognizes the possibility of implied amendment or repeal when the later statute by "its general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended." But case law has not applied the constitutional provision when the incorporated provision dealt not with substantive law, but only with procedure or jurisdiction. In any event, a later section of Article III of the constitution makes the incorporation by reference provision inapplicable when the statute in question is recommended to the legislature by commissioners or any public agency appointed to prepare revisions of statutes. This Article III section can, of course, be amended to add a further exception specifically validating a construction provision made applicable unless the express language of the later enacted statute requires or provides otherwise.

C. Can a Workable Statute be Devised?

How would such a construction provision work? An illustration can be found by focusing on how the court makes a determination as to what is and what is not jurisdictional. Here one is faced with a hodgepodge even greater than that involving what parts of the legislative history will be used and when. Jurisdiction, we are told, "is a word of elastic, diverse and disparate meanings." It turns upon whether a court has control over the person sued or the property or status involved and competence to decide the issue presented. Competence to decide an issue will depend upon whether the subject matter of the action has been assigned by the authority creating the court to that court, but the court's competence need not be exclusive. Furthermore, in light of the supremacy clause of the Federal Constitution, competence may also turn, as to a subject that would otherwise be within the competence of state as well as federal courts, on whether the Congress has indicated its intention that the issue be decided only in federal court and that the state court be preempted

77. Id.
from dealing with it.\textsuperscript{81}

While territorial limitations on the jurisdiction of a court concerning a matter it would be competent to act upon within its prescribed territory are not directly related to competence, territorial limitations are nevertheless said to be, like subject matter competence, "a jurisdictional limitation not subject to waiver," at least in criminal cases.\textsuperscript{82} Mootness, standing, and justiciability are also sometimes characterized, incorrectly, as matters of subject matter jurisdiction. They deal, however, not with the competence of a court, but with whether an otherwise competent court should decline to act\textsuperscript{83} on one of three grounds: in deference to the discretionary authority vested in another branch of government, in deference to the more broadly ranging fact inquiry power of the legislature,\textsuperscript{84} or in order not to render an advisory opinion.

Part of the confusion about jurisdiction results from the failure of courts to differentiate the contexts in which the inquiry is made. That a court which fails for six years after verdict to sentence a

\textsuperscript{81} See generally Restatement (Second) of Judgments, §§ 65 comment d, 69 comment d, Ch.2 passim (1982). Preemption may also be concerned with legislative, as distinct from judicial competence, as when a legislative body with overriding authority in relation to another legislative body (e.g., federal as to state or state as to county, town or other municipality) acts with respect to a particular subject without making clear whether its enactment supersedes, and if so to what extent it supersedes, legislation on the same subject enacted by the "inferior" legislature. See, e.g., Sasso v. Vachris, 66 N.Y.2d 28, 484 N.E.2d 1359, 494 N.Y.S.2d 856 (1985); Note, Preemption or Preservation of State Remedies Under ERISA? The New York Court of Appeals Preserves a State Remedy in Sasso v. Vachris, 60 St. John's L. Rev. 567 (1986). The author's use of judicial preemption and failure to discuss legislative preemption is for purposes of illustration only. A construction act such as is proposed should deal with the legislative preemption situation also. The report of the California Subcommittee concluded that the issue was essentially factual and not amenable to resolution by statute, see Report supra note 56, at 13, but a classification statute similar to that proposed in the text above, regarding judicial preemption, may be possible.

\textsuperscript{82} People v. Shepherd, 68 N.Y.2d 841, 843, 500 N.E.2d 871, 872, 508 N.Y.S.2d 173, 174 (1986); cf. Rush v. Mordue, 68 N.Y.2d 348, 353, 502 N.E.2d 170, 174, 509 N.Y.S.2d 493, 497 (1986)(holding that the extraordinary remedy of prohibition is available when a court exceeds its jurisdiction by, for example, the prosecution of a crime committed outside the county's geographic jurisdiction).


\textsuperscript{84} To the extent that courts do not always defer, but rather often do go outside the record to investigate "legislative facts," or simply assume the facts necessary to decide or resolve the problem in terms of burden of proof, they should be provided with a fact finding agency permitting them to research the necessary facts, and to do so openly and on notice to the parties. See Davis, Judicial, Legislative and Administrative Lawmaking: A Proposed Research Service for the Supreme Court, 71 Minn. L. Rev. 1 (1986); Meyer, Justice, Bureaucracy, Structure and Simplification, 42 Md. L. Rev. 659, 679-81 (1983).
criminal defendant loses its power to do so may be said to result from a lack of subject matter jurisdiction or simply from an act in excess of the court's powers and therefore illegal. Whatever the basis for the holding, its consequence, quite properly, should be the release of the sentenced defendant from prison. That the court which sentenced the defendant had lost competence to do so does not, however, mean that in carrying out a sentence imposed by a court having apparent jurisdiction in the premises, the state should be held in damages for false imprisonment. Whatever the basis for upsetting the sentence, however, the issue in the damage action is not truly one of jurisdiction, but rather whether the tort of false imprisonment extends to one who carries out an order of a court which appears to have jurisdiction even though in fact it does not.

Moreover, except when the exercise of jurisdiction would be aberrational under the statute governing a particular court, as where the Family Court attempts to grant a divorce, a court has jurisdiction to determine whether it may or should retain jurisdiction. That it may in such a case determine erroneously that it has jurisdiction is a matter subject to correction on direct appeal. Unless so appealed, however, a finding of jurisdiction will be binding on the parties, and the orders issued by such a court will be binding upon and protective of those affected by it. Thus, for example, the failure of a state court to apply the controlling Federal Arbitration Act in an interstate commerce situation is an error of law, not an act beyond the subject matter jurisdiction of the court.

The problem presented in this article is not concerned with such an aberrational situation, since by definition the statutory statement of jurisdiction requires no clarification, nor is this article concerned with the substantive elements of a tort cause of action in which the absence of jurisdiction is a given. Rather, this article focuses, first,


on those situations in which a legislative body enacts a statute which imposes a requirement without specifying the consequence of failure to meet it, and, second, on those situations where Congress fails to make clear the authority of state courts with respect to enforcement of federal statutes.

The situations in the first category are many. In such cases an attorney whose client would be favored by his doing so can be expected to argue, in the absence of a governing statutory construction provision, that the requirement is jurisdictional rather than procedural and that because the jurisdictional requirement had not been met the court had no choice but to dismiss. Faced with such an argument, the deciding judge, who may be moved by compassion for the defaulting litigant (for hard cases, as we know, often make bad law), may strain to find in the legislative history an indication that the statute is to be liberally construed in favor of the group of which the defaulter is a member, and, on that basis, conclude that the requirement is, indeed, procedural. But he may also conclude that it is jurisdictional because, by making clear in other unrelated statutes that the court has power to relieve a default in meeting similar requirements, the legislature has demonstrated that it knows how to provide such relief, yet failed to do so in the statute under construction.

Worker's Compensation Act provisions concerning the claimant's right of appeal present a typical situation where the court must interpret a statute in which the legislature has failed expressly to state the consequences of a litigant's failure to meet the statute's requirements. The provision governing the time within which to appeal the decision of the board is normally stated simply in terms of a number of days from the date of the decision, is often phrased permissively (for example, "may be prosecuted") rather than in mandatory language ("shall be prosecuted"), and never specifically addresses whether the requirement is jurisdictional. Yet the majority of states that have considered the question have held that the failure to comply with the time requirement is an absolute bar, even though in some cases the delay is as little as one day. The contrary deci-

88. See infra notes 90-95 and accompanying text.
89. See infra notes 96-101 and accompanying text.
sions generally apply an excusable neglect concept, weighing the merit of the claimant’s position against the prejudice to the insurance carrier.\textsuperscript{91} They do so on the basis of the remedial purpose of the compensation law, the failure of the legislature to speak specifically to the question, and the ability of the legislature to amend the time limitation to include language such as “shall be forever barred” if it disagrees with the holding that the provision as enacted is procedural rather than jurisdictional.\textsuperscript{92}

The reasoning of such cases may not be applicable, however, in situations other than compensation appeals. Thus, the West Virginia Supreme Court, which held the time limit procedural in compensation cases,\textsuperscript{93} refused to extend that ruling to election appeals\textsuperscript{94} or to the time within which a person whose license had been suspended for driving while intoxicated could request a hearing.\textsuperscript{95} The difference in the rulings may stem from the purpose of the statute involved; compensation laws are intended to remedy the plight of injured employees, whereas election matters usually proceed within a tight time frame requiring strict compliance, and the purpose of a DWI law is to deter the conduct it proscribes. It is, of course, true that in many cases a court will reach the conclusion that would be required by a statutory construction provision, but the compensation cases illustrate that that will not always be true. Moreover, to argue that there need be no such statutes because most cases will be decided correctly in any event is to overlook the fact that when the statute is specific there is no need for a court to construe it. In this day of ever expanding use of the courts that is an important consideration, suffi-

\begin{itemize}
\item \textsuperscript{91} Smith v. Dep't of Labor and Indus., 23 Wash. App. 516, 596 P.2d 296 (1979); see generally A. Larson, Workmen’s Compensation Law § 80.52(a)(1983)(surveying those states in which failure to comply with time requirement serves as an absolute bar).
\item \textsuperscript{93} See, e.g., Bailey, 296 S.E.2d at 901; Railway Express Agency, 415 Ill. at 294, 114 N.E.2d at 353.
\item \textsuperscript{94} Brady v. Heckler, 346 S.E.2d 546 (W. Va. 1986); see Carr v. Board of Elections, 40 N.Y.2d 556, 356 N.E.2d 713, 388 N.Y.S.2d 87 (1976). The holding in Wells v. Noldon, 679 S.W.2d 889 (Mo. Ct. App. 1984), that the filing of a petition to contest an election prior to certification of the election results is jurisdictional where the statute required filing not later than 30 days after the official announcement of the election results seems open to serious question, however, the purpose of the provision being as fully satisfied by premature notice as it would be by post-announcement filing.
\item \textsuperscript{95} State ex rel Ruddlesden v. Roberts, 332 S.E.2d 122 (W. Va. 1985).
\end{itemize}
cient of itself to warrant enactment of such construction provisions.

D. **What Form Should Such a Statute Take?**

It is not feasible in the space available to attempt to assess the value of a construction statute in all of the possible situations to which it may be applied, but the reader will see the gist of my thinking from the two suggestions that follow. With respect to statutorily imposed time limits, such a statute would provide that, absent express language in the statute imposing a time limit (such as "shall be a fatal defect" or "shall be forever barred"), the court has discretion to balance the reason for failure to comply and the effect of dismissal on the non-complying litigant, on the one hand, against the prejudice to his opponent resulting from a refusal to dismiss on the other. The preemption situation, however, would be better dealt with in a different way. Because federal preemption law provides a more readily understandable illustration, the discussion which follows is of federal law. The principle can, however, also be applied to state or local area preemption.

The Supreme Court has held that there is a presumption that state courts enjoy concurrent jurisdiction with that of federal courts to enforce federal statutes, but the presumption "can be rebutted by explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state court jurisdiction and federal interests."96 The burden on courts required to decide such preemption cases could be materially reduced by a statutory construction provision similar to those now in effect in some states. For instance, the Pennsylvania provision specifies the types of statutes that must be strictly construed and requires that all others be liberally construed.97 Similarly, the classification device in New York's sentencing provisions divides offenses into specified classes and, by including within the statute defining a particular offense a statement of its class designation, incorporates by reference the limits of the sentence that may be imposed for conviction of that offense.98

The Congress could thus, for example, designate as Class A, statutes enforceable only in the federal courts, as Class B, statutes which state courts would be permitted, but not required to enforce,99

97. See 1 PA. CONS. STAT. ANN. § 1928 (Purdon 1987).
98. N.Y. PENAL LAW §§ 55.05, .10 (McKinney 1975).
and as Class C, statutes which must be enforced not only by federal courts but also by state courts,\textsuperscript{100} provided only the particular state court is jurisdictionally competent to hear claims of the type involved and subject to its declination to do so on \textit{forum non conveniens} grounds.\textsuperscript{101} Such a statutory construction provision should also specify the criteria upon which, absent a class designation in a particular statute, the preemption determination should be made.

Such provisions are not the only available means for clarifying the present confusion as to the use of legislative history in statutory interpretation. A more direct method, and one which will be of particular importance in situations that do not lend themselves to a classification type construction statute, is a provision which not only authorizes the use of contemporaneous legislative history, but also defines and limits the type of materials that constitute the legislative history that may be used.

Here it becomes necessary to distinguish the context of the particular statute and the background for its enactment from the legislative materials that may be used to give definition to an otherwise ambiguous term. Thus, the context of a compensation statute which uses language of jurisdiction with respect to the giving of notice of claims ("no proceeding . . . shall be maintained unless"), but also uses words of limitation with respect to the filing of an application for compensation ("the right to file . . . shall be barred"), evidences, without resort to extraneous materials, the intent of the legislature that the application requirement not be jurisdictional.\textsuperscript{102} The background for enactment may be found in some respects in legislative materials, but is a good deal broader. It may include not only such materials, but also the court decision or decisions which gave rise to its enactment, "tradition . . . formerly rooted in the common law,"\textsuperscript{103} and legislative facts of which a construing court takes judicial notice or which it sometimes simply assumes.\textsuperscript{104}

The legislative materials now referred to are those discussed in the first part of this article.\textsuperscript{105} But as that discussion has evidenced, those materials are sometimes contrived and may not be deemed in-

\textsuperscript{100}. \textit{See} Testa v. Katt, 330 U.S. 386 (1947).
\textsuperscript{101}. Under the doctrine of \textit{forum non conveniens}, a court may dismiss an action because the chosen forum, while a proper venue, is inconvenient. \textit{See}, e.g., Banco Ambrosiano, S.P.A. v. Artoc Bank \& Trust Ltd., 62 N.Y.2d 65, 464 N.E.2d 432, 476 N.Y.S.2d 65 (1984).
\textsuperscript{102}. \textit{See Railway Express Agency}, 415 Ill. at 294, 114 N.E.2d at 353.
\textsuperscript{104}.\textit{Davis}, \textit{supra} note 84, at 9-10.
\textsuperscript{105}. \textit{See supra} notes 35-50 and accompanying text.
indicative of the majority consensus, which is a sine qua non of legislative intent. The criteria governing which materials should play a part in the interpretation process have been referred to in several articles as contemporaneity, credibility, proximity and context. They are, I think, more readily understandable if stated in terms of the legislative consensus, which is the object of their use, as proximity in time, reliability, and availability. As here used, proximity in time means proximity to the vote by which the legislative majority in each house approved the proposed bill, reliability means the relation of the source from which the material comes to the legislative process, and availability denotes the accessibility of the materials to those voting upon the measure before their votes are cast, and to those who advise persons who will be governed by the statute.

It is often said that ignorance of the law is no excuse, but surely due process does not permit the loss of property or liberty for acts which are brought within the governing statute only by resort to materials not readily available to those to whom knowledge of its meaning and scope is thus imputed. Moreover, it being the intent of the legislature from which the meaning of an ambiguous provision is to be discerned, only those materials which were available to a voting legislator prior to his vote should be considered, and the materials considered should be so closely related to the movement of the bill through the legislature as to insure reliability.

Within the foregoing criteria, then, the construction statute proposed should define what materials may properly be considered by a court in interpreting a statute. Furthermore, because it is legislative intent that is sought, the legislature would be acting within the scope of its constitutional authority and not in violation of separation of powers principles if it provided in a construction statute not just that "legislative history" may be considered, but instead defined the materials that may be used by excluding from consideration those

which do not meet the previously described criteria.\textsuperscript{109}

E. What Legislative Materials Should Remain Available?

While not intended to be a completely exhaustive list, the following materials presently used should be excluded by such a construction provision. The material in what is referred to as the Governor's bill jacket comes into being prior to the bill becoming law by the affixation of the Governor's signature. This material, however, was not available to the legislators who voted on the measure, and thus, while such material could bear on the intent of the Governor, it has no bearing upon the intent of the legislature, whose intent determines meaning. Moreover, the comments contained in a bill jacket are often made by partisans not otherwise involved in the legislative process. Bill jacket materials should, therefore, be excluded. The one exception to that rule would be a message or memorandum to the legislature from the Governor concerning legislation he has proposed, provided it is available to legislators before passage and also to the public.\textsuperscript{110}

Hearing testimony should be excluded. Although hearings are held before passage, they are attended by few legislators, are seldom accessible to others, and generally include testimony of persons not closely related to the legislative process. Debate materials should likewise be excluded for the reasons indicated at the beginning of this article,\textsuperscript{111} except when included as supporting material in a committee report.

Committee reports are prepared prior to passage by those closely related to the legislative process and should be usable. Use of these reports, however, should be subject to the limitation, now a part of Pennsylvania's construction statute, that they have been "published or otherwise generally available prior to the consideration of the statute by the [legislature]."\textsuperscript{112} Unlike the Pennsylvania statute, however, the statute should not limit use of the reports to those of the committee which drafted the statute. Statements by those who drafted the proposed bill are not as related to legislative consensus as


\textsuperscript{110} See 1 Pa. Cons. Stat. Ann. § 1939 (Purdon 1981); see also Mikva, supra note 38, at 184 (Judge Mikva, a former Senator, has characterized the Committee report as "the bone structure of the legislation").

\textsuperscript{111} See supra notes 35-38 and accompanying text.

is the explanation of its provisions contained in a report prepared by a reviewing committee and addressed to the legislative body as a whole. On like reasoning, the Official Comment prepared by study groups, such as the Commissioners on Uniform Laws, which Professor Davies refers to as "split level legislation," should also remain usable, except where the later committee report takes a different position.

III. CONCLUSION

The purpose of this article has been to propose that the area for judicial construction be contracted by use of an incorporated classification statute or a general construction provision which more often than not will be incorporated, and by withholding from the consideration of judges required to perform the construction task materials which are but peripherally related to the task. The proposals advanced should have appeal to legislators, who will have greater assurance that the meaning of a statute cannot be skewed through the use of such materials. These suggestions should also appeal to judges, who will have less of a problem in dealing with the ambiguity of ambiguity than they do now. There may be other and better methods for achieving the same ends. Indeed, it is hoped that a research project to investigate all phases of the problem, in greater depth than has been possible in this article, can be established. Until that is done, however, the proposals here made will, it is believed, bring us closer to the full meaning of the proud boast that ours is a government of laws and not of men.

113. J. Davies, supra note 61, at 173. See Kaplan v. Superior Court, 6 Cal. 3d 150, 158 n.4, 491 P.2d 1, 5 n.4, 98 Cal. Rptr. 649, 653 n.4 (1971)(California Supreme Court stating: "[t]hese comments are declarative of the intent not only of the draftsmen of the code, but also of the legislators who subsequently enacted it"); see also People v. Williams, 16 Cal. 3d 663, 547 P.2d 1000, 128 Cal Rptr. 888 (1976)(stating that the official comments of the California Law Revision Commission are declarative of the intent not only of the draftsmen of the code, but also of the legislators who subsequently enacted it). Note, however, that in these cases the committee reports had expressly adopted the comments.